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Notes on a fire

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My first meeting with Professor Tsuno occurred under somewhat less than edifying circumstances. On an excursion to a restaurant in the Black Forest at one of the SIHDA conferences, a waitress had accidentally spilt an entire tray of drinks over me as I sat at a table waiting for lunch to be served. Drenched in alcohol, I was struggling to maintain my normally good-natured *persona*. Professor Tsuno, who was sitting near me and who had narrowly avoided that same tray of drinks, dryly observed that perhaps the *actio de effusis vel deiectis* might be apposite in this case. This good-humoured attempt at Romanist wit did much to improve my mood on the day. It is therefore my pleasure to repay that compliment by contributing this small piece to his *Festschrift*. The focus of this piece is a single text by Ulpian:

D.19.2.11.1 (Ulpian. 32 ad Ed.) Si hoc in locatione convenit ‘ignem ne habeto’ et habuit, tenebitur etiam si fortuitus casus admisit incendium, quia non debuit ignem habere. Aliud est enim ignem innocentem habere: permittit enim habere, sed innoxium, ignem.

If it was a term of the lease that the tenant should have no fire, but he had one, he will be liable even if a conflagration arose accidentally, for he had no right to have a fire at all. It would be a different thing if the term were that he should keep his fire innocuous; this allows him to have a fire, though only one that does no harm. [Monro translation]¹

In this seemingly uncontroversial text, Ulpian sets out two rules in relation to the keeping of a fire in a rented property. Rule 1: Where it had been agreed in the lease *ignem ne habeto* and the tenant had a fire which causes loss to the landlord, the tenant will be liable under the contract (*ex locato*) even if the fire had occurred *fortuito casu*, since he had no right to have a fire. Rule 2: Where it had been agreed in the lease *ignem innocentem habeto/ignem negligentiam ne habeto* (we cannot be certain about the wording of the contractual provision), and the tenant had a fire which causes loss to the landlord, the tenant will be liable under the contract (*ex locato*), “if it does harm”, that is, where *dolus* or *culpa* can be attributed to the tenant

¹ Monro, C. *Digest XIX.2. Locati Conducti* – translated with notes (Cambridge 1891).

or those for whom he is legally responsible.² From a dogmatic perspective, therefore, the effect of the contractual provision articulated in Rule 1 (*ignem ne habeto*) was to extend the scope of the tenant's contractual liability beyond the default "standards".³ It is not my intention in this contribution to focus on the dogmatic implications of this text as they are well documented. Instead, I wish to show that by examining the broader context of this statement, it is possible to gain new insights into the text.

Establishing the motivations for the creation of such a contractual provision is a difficult (some might say impossible) task as many variables, such as the nature of the property and the interests of the landlord, have to be taken into account.⁴ This becomes especially difficult in the case of texts from the Digest which have been stripped of their context. Traditionally, scholars of Roman law have examined the Palingenetic context of these texts in an attempt to establish some context. In the case of D.19.2.11.1, the text is surrounded by two other statements by Ulpian. They are:

D.19.2.11 pr (Ulpian. 32 ad Ed.) Videamus an et servorum culpam et quoscumque induxerit praestare conductor debeat? Et quatenus praestat, utrum ut servos noxae dedat an vero suo nomine teneatur? Et adversus eos quos induxerit utrum praestabit tantum actiones an quasi ob propriam culpam tenebitur? Mihi ita placet, ut culpam etiam eorum quos induxit praestet suo nomine, etsi nihil convenit, si tamen culpam in inducendis admittit quod tales habuerit vel suos vel hospites: et ita Pomponius libro sexagesimo tertio ad edictum probat.

Let us consider this point: Is a lessee bound to answer for negligence on the part of his slaves or of such other persons as he allows to be on the premises? And if so, how far does his responsibility extend? Is it enough in the case of slaves to surrender for *noxae*, or will he be liable personally? And in the case of other persons, is it enough to assign to the lessor his own rights of action against them, or must he answer for their negligence just as if it were his own? My own opinion is this; he must answer personally for the negligence even of those whom he introduced, although there should have been no agreement to that effect, that is, provided it was his own negligence that he introduced them, in short there was negligence in having

² This is articulated in a text which covers similar ground, but where the context is clearly rural land which had been rented out for an agricultural purpose, see D.19.2.9.3 (Ulpian. 32 ad Ed.).

³ For an expansive discussion of the development of the notions of risk and liability in the contract of letting and hiring, see Du Plessis, P. "'Liability', 'Risk' and *Locatio Conductio*" in *Modelli teorici e metodologici nella storia del diritto privato IV* (Naples 2011), 63 – 95.

⁴ Frier, B. *Landlords and Tenants in Imperial Rome* (Princeton, NJ. 1980), 63.

such persons in the house, whether they were members of the family or guests. This view is confirmed by Pomponius (ad Edict. Lib. LXIII.). [Monro translation]

...

D.19.2.11.2 (Ulpian. 32 ad Ed.) Item prospicere debet conductor ne aliquo vel ius rei vel corpus deterius faciat vel fieri patiatur.

Moreover the person who hires is bound to see that he does not impair or suffer to be impaired any right attached to the thing let, or do or allow any injury to the thing itself. [Monro translation]

At first sight, these two texts which surround D.19.2.11.1 do not seem to provide much contextual information. Neither reveal what type of thing was let or what may have motivated the landlord in D.19.2.11.1 to draft a provision *ignem ne habeto*. It is my contention, however, that D.19.2.11 pr, a text traditionally used to explain the evolution of the tenant's vicarious liability for slaves and dependants, in fact reveals much more about the context of D.19.2.11.1 than previously realised. To demonstrate this, I wish to focus on three aspects of the contractual provision expressed in Rule 1.

The first relates to the wording of the contractual provision recorded here. References in the Digest to contractual provisions forming part of the contract of letting and hiring occur in two forms.⁵ Let us take two examples:

D.19.2.29 (Alfen. 7 Dig.) In lege locationis scriptum erat: 'redemptor silvam ne caedito neve cingito neve deurito neve quem cingere caedere urere sinito.' ...

A written lease contained the following provisions: "The lessee shall not fell, bark or burn trees, nor suffer any one to fell, bark or burn." ... [Monro translation].

D.19.2.30.3 (Alfen. 3 Dig. a Paulo Epit.) Qui aedem faciendam locaverat, in lege dixerat: 'quoad in opus lapidis opus erit, pro lapide et manupretio dominus redemptori in pedes singulos septem dabit.' ...

A person who engaged another to build a house inserted the following term in the contract: "So far as any stone shall be required for the work, the employer is to give the contractor 7 sesterces a foot for the stone and the labour": ... [Monro translation]

⁵ Du Plessis, P. "The Roman Concept of *Lex Contractus*", 2006 (3 – 1) *Roman legal tradition*, 79 – 94.

The careful reader will have noticed two points of difference in these texts. In the first, it is explicitly stated that the *lex locationis* was written (... *scriptum erat* ...), whereas the second merely mentions that the *lex* stated (... *dixerat* ...). Whether this should necessarily be taken to mean that the *lex* in the second text was unwritten is virtually impossible to establish, especially since it is not always clear from the texts whether the *lex* in any given example was recorded in writing or not. It was certainly not a legal requirement that the *lex* had to be written down, although our sources suggest that recording was common in more complex transactions and that the written *lex* had some evidentiary value in a court of law.⁶ The second notable point about these two texts is the difference in the Latin used. While it can of course not be ruled out that Paul's epitome of Alfenus' work in the second text may account for the change in the Latin, it is notable that the Latin used in the contract in the first text is very different to that used in the second. The Latin used in the first text is very formal and reminiscent of legislative provisions in old statutes such as the Twelve Tables, whereas the Latin used in the second text seems more colloquial by comparison. If we compare the Latin used in D.19.2.29 with that of D.19.2.11.1, we notice the same formal and archaic style. We may therefore conclude that the contractual term cited in D.19.2.11.1 referred to a written *lex*.

The next question to investigate is whether it is possible to pinpoint the type of industry to which Ulpian likely referred in this text. Elsewhere I have argued that the *lex contractus* in the case of letting and hiring did not always consist of a single document.⁷ In certain industries, especially where a contractual middleman was present, the *lex* consisted of a set of general rules of law which were conventional in that industry and which were publicly displayed. These were seen as rules which governed all contracts relating to that industry and any individual agreements between the contractual middleman and individual tenants was regarded as incorporating these general rules *ex lege*. If this interpretation is correct, then, based on the language used in D.19.2.11.1, it must be assumed that the larger context in which this statement was made must have been a type of industry in which it was conventional to use this type of arrangement. Of the various industries mentioned in the context of letting and hiring in the *Corpus Iuris Civilis*, there are two likely candidates, namely letting and hiring of a *horreum* or of an *insula*.⁸ Given the paligenetic context established above,

⁶ See generally Meyer, E. *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge 2004).

⁷ Du Plessis, 2006 (3 – 1) *Roman legal tradition*, 79 – 94.

⁸ On the letting of a *horreum*, see Du Plessis, P. "Between Theory and Practice: New Perspectives on the Roman Law of Letting and Hiring", 2006 *CLJ* (65), 423 – 437.

the most likely candidate is that of an *insula* rented by a contractual middleman, a venture capitalist, who sublet spaces and apartments within it for profit. The middleman could manage the *insula* in one of two ways, namely either using the staff which came with the *insula* (usually slaves belonging to the owner) or using his own staff in the form of a building manager, *insularius*, and staff.

Assuming that this is correct, it must be asked why such a rule was required. On one level, this is not difficult to fathom, given the ever-present potential hazard of conflagration. Of course we cannot tell in which set of contracts this provision occurred, whether in those between owner and primary tenant or between primary and secondary tenants and since no example of such contracts have been preserved, we will probably never know. Therefore, both possibilities will be examined. The legal ramifications of a fire in an *insula*, could potentially have serious consequences for the contractual middleman who rented the entire tenement from the owner. Let us first assume that the term *ignem ne habeto* formed part of the contract between the owner of the *insula* and the venture capitalist who rented it as a business. By inserting such a clause in the contract, the owner of the *insula* wished to protect his asset by sending an unambiguous message. In a sense, this is a specific manifestation of *frui*, that is the permitted use and enjoyment which the tenant acquired by virtue of the payment of rent.⁹ Any contravention of this term whether by the middleman or his legal dependants would constitute breach of contract and would enable the landlord to sue *ex locato* for his *id quod interest*.¹⁰ It goes without saying that the inclusion of a contractual provision of this kind would have narrowed the contractual middleman's ability to generate profit from the *insula*, but in certain circumstances this must have been a risk worth taking. Let us assume that the term *ignem ne habeto* formed part of the contract between the contractual middleman and his tenants. There are two possible scenarios under which this could have occurred. First, if it had been a term of the contract between the owner of the tenement and the contractual middleman, it would have to be passed on to the secondary tenants as well, since the prohibition on having a fire constituted a concretisation of the general entitlement to *frui* which the contractual middleman had received by virtue of the payment of rent. In second place, the contractual middleman may have decided to restrict the *frui* of his tenants in such a manner without the prohibition against the keeping of any fire having been imposed upon him by the owner of the

On the letting of an *insula* see Du Plessis, P. "Janus in The Roman Law of Urban Lease", 2006 *Historia* (55 – 1), 48 – 63.

⁹ Frier, *Landlords and Tenants*, 75, 146 – 148.

¹⁰ D.19.2.15 pr – 1 (Ulpian. 32 ad Ed.)

tenement. The motivations for doing so will be explored presently. For the moment, it deserves mention that a fire in the *insula* could of course also have delictual implications. Take the following text:

Coll.12.7.1 – 5 (Ulpian. 18 ad Ed.) Item si insulam meam adusseris vel incenderis, Aquiliae actionem habebō, idemque est et si arbustum meum vel villam meam. (2) Quod si dolo quis insulam exusserit, etiam capitis poena plectitur quasi incendiarius. (3) Item si quis insulam voluerit exurere et ignis etiam ad vicini insulam pervenerit, Aquilia tenebitur lege vicino etiam non minus inquilinis ob res eorum exustas, et ita Labeo libro xv Responsorum refert. ...

Likewise if you burn or set fire to my apartment house, I will have the Aquilian action, and the same is true if (you burn) my orchard or villa. (2) But if someone deliberately (*dolo*) burnt my apartment house, he is also punished by capital punishment as an arsonist. (3) Likewise if someone wishes to burn an apartment house and the fire also spreads to a neighbor's apartment house and burns it up, he will be liable to the neighbor under the Aquilian law, and also to the tenants for their burned property, and so Labeo writes in the fifteenth book of his *Responses*. ... [Frier text and translation]¹¹

Thus, aside from contractual ramifications, a fire in an *insula* could also have potentially wide-ranging delictual implications, since the burning down of an *insula* would clearly be a case of *urere/corruptere* under chapter 3 of the *Lex Aquilia*.¹² While these could not be brought concurrently, it is clear from the latter part of the above-cited text that delictual liability could potentially be quite extensive and could extend to loss caused also to neighbouring buildings.

But could there be an administrative angle to the contractual term *ignem ne habeto*? Let us take the following text:

D.21.1.63 (Ulpian. 1 ad Ed. Cur. Aed.) Sciendum est ad venditiones solas hoc edictum pertinere non tantum Mancipiorum, verum ceterarum quoque rerum. Cur autem de locationibus nihil edicatur, mirum videbatur: haec tamen ratio redditur vel quia numquam istorum de hac re fuerat iurisdictio vel quia non similiter locationes ut venditiones fiunt.

It must be realized that this edict applies to all sales, not only to those of slaves but also those of anything else. There used to be surprise that no edict was propounded in respect of hire; the explanation is either that the aediles never had jurisdiction over this contract

¹¹ Frier, B. *A Casebook on the Roman Law of Delict* (Atlanta, Ga. 1989), 74.

¹² See McCormack, G. "Aquilian *Culpa*" in *Daube Noster* (Edinburgh 1974), 201 – 224.

or that circumstances are different in hirings from those in sales.
[Watson translation]¹³

This classic text in which the Edict of the *Aediles* concerning the declaration of latent defects in the sale of slaves at market are extended to all sales, contains an interesting observation by Ulpian in the final sentence. According to Ulpian, the *Aediles* never had jurisdiction over the contract of letting and hiring, in other words, there was never the same level of administrative oversight regarding this contract. But does this mean that there were no administrative interventions in the letting and hiring of *insulae* in Rome? It is well known that building regulations were imposed on the quality of materials used and the height of *insulae* after a series of disastrous fires in Rome.¹⁴ But apart from building regulations, there is also a faint suggestion in the texts that the *Praefectus Vigilum* had a certain level of administrative jurisdiction over matters related to the contract of letting and hiring. Take the following text:

D.1.15.3.4 (Paul. 1 de Off. Praef. Vig.) ... Ut curam adhibeant omnes inquilinos admonere, ne negligentia aliqua incendii casus oriatur. Praeterea ut aquam unusquisque inquilinus in cenaculo habeat, iubetur admonere.

... And he is obliged to admonish all occupiers not to let fires break out through some carelessness. Moreover, he is under orders to warn everyone to have a supply of water ready in an upstairs room.
[Watson translation].

Thus, in the city of Rome, the *Praefectus Vigilum* and his staff were tasked with cautioning all tenants or property in the city not to cause fires through their lack of care (*aliqua negligentia*). This text also demonstrates that practical steps were taken – the keeping of water in all apartments – to ensure that a blaze could be tackled. How does this text relate to D.19.2.11.1? It is tempting to suggest that is primarily aimed at the second scenario set out there, namely where tenants were allowed to have fires, provided they were kept carefully. In reality, however, it may be that the rules set out in D.1.15.3.4 had a wider application and formed part of a general attempt to fire-proof all tenements, whether the tenants were allowed to keep fires or not.¹⁵ On final text deserves mention:

D.1.15.4 (Paul. 1 de Off. Praef. Vig.) Imperatores Severus et Antoninus Iunio Rufino praefecto vigilo ita rescripserunt: ‘Insularios

¹³ Watson, A. (ed.) *The Digest of Justinian* (Philadelphia, Pa. 1985).

¹⁴ Robinson, O. *Ancient Rome: City Planning and Administration* (London 1992), 35 – 36.

¹⁵ Robinson, *Ancient Rome*, 107 – 110.

et eos, qui neglegenter ignes apud se habuerint, potes fustibus vel flagellis caedi iubere: eos autem, qui dolo fecisse incendium convincentur, ad Fabium Cilonem praefectum urbi amicum nostrum remittes: ...

The Emperors Severus and Antoninus issued a rescript to Junius Rufinus, prefect of the city guard, in the following terms: “You can also order to be beaten with sticks or flogged those flat-dwellers who have kept their house-fires carelessly. But those who are convicted of wilful and malicious arson, you should remit to our friend Fabius Cilo, prefect of the city. ...” [Watson translation]

In this text we can see that the jurisdiction of the *Praefectus Vigilum* went further than mere admonishment. According to an Imperial rescript, he could order corporal punishment (*fustibus vel flagellis*) where a careless fire had been kept. The final part of the text confirms what has already been observed in the text from the *Collatio* above, namely that those who deliberately set fire to an *insula* were tried as arsonists. Here we can see that this would have been handled by the *Praefectus Urbi*. A final observation about this text relates to those who the *Praefectus Vigilum* could order to be punished for keeping a careless fire. Notice that they include the *insularius* and *ei, qui neglegenter ignes apud se habuerint*. Thus not only the tenants themselves who kept careless fires, but also the *insularius*, the (servile or free) building manager could be punished.

So where does this leave us in relation to *ignem ne habeto*? In his seminal book on Roman housing, Simon Ellis argued that it is nearly impossible to identify a designated kitchen space in Roman housing, especially in *insulae*.¹⁶ In his view, the reasons for this may relate to the fact that many tenants used mobile fires or acquired their food mainly from the many cook shops which could be found in the city. D.19.2.11.1 adds a new level to this discussion. It may well be that in many cases, tenants were compelled to acquire their meals outside their rented accommodation as they were prohibited by virtue of their contracts with the landlord from having fires at home. The motivation for including such a contractual provision in a tenancy agreement was undoubtedly motivated by a desire on the part of the owner of the tenement building to protect his economic asset, but there was clearly also an interplay between private and public law in relation to the prevention of fires.

¹⁶ Ellis, S. *Roman Housing* (London 2000), 159.